No. 22555

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK RAY CULBERTSON, Petitioner and Appellant, vs. STATE OF CALIFORNIA, et al., Respondents and Appellees.	)	No. 22555 RESPONDENT'S BRIEF

On Appeal From the United States District Court
For the Southern District of California

BRIEF OF THE CITY OF SAN DIEGO

AS RESPONDENT

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UNITED STATES COURT OF APPEALS

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STATEMENT OF THE FACTS

Appellant owned and operated the "E Street Newsstand" located at 429 "E" Street in San Diego, California. He sold periodicals, cigarettes, sundries and photographs and also exhibited so-called "girlie" films on coin operated projectors located in small, individual booths within the store. On March 16, 1965, appellant was arrested and charged with violating California Penal Code Section 311.2[1] for the exhibition of four reels of film on the above-described projectors.

STATEMENT OF THE PROCEEDINGS BELOW

On March 19, 1965, appellant was formally arraigned and charged with a violation of Section 311.2, at which time he entered a plea of not guilty. The case

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1. "Section 311. Definitions

As used in this chapter:

(a) 'Obscene means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to purient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any other picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene. (Added Stats. 1961, c. 2147, p. 4427, § 5.)

"311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this Stat prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. (Added Stats. 1961, c. 2147, p. 4428, §5.)"

came to trial on August 10, 1965. The Honorable Earl B. Gilliam, Judge, sitting without a jury, made the initial determination that the films were obscene as a matter of law. Appellant was subsequently tried and found guilty by a jury. On November 8, 1965, appellant's sentence was suspended and probation for one year was granted. Appellant filed a Notice of Appeal on November 8, 1965, and duly pursude his appellate remedy before the Appellate Department of the Superior Court of San Diego County. Appellant's conviction was affirmed by the Appellate Department on May 25, 1966. [2] The transfer on certification to the District Court of Appeal of the State of California, Fourth Appellate District, was denied on June 13, 1966. On June 27, 1966, petitioner filed an application for a writ of habeas corpus in the United States District Court for the Southern Division of California, which application was denied on September 14, 1966. Petitioner did not appeal. The one-year probationary period expired on November 8, 1966. On October 3, 1967, petitioner filed a writ of error coram nobis with the United States District Court for the Southern Division of California. On November 6, 1967, respondent filed a Notice of Motion, Motion to Dismiss, and Points and Authorities supporting said Motion, in opposition to petitioner's application for said writ. On November 22, 1967, the district court dismissed the petition for the writ of error coram nobis. Appellant appeals from the order dismissing the writ.

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2. People v. Culbertson, 242 Cal. App. 2d Supp. 916

SPECIFICATION OF ISSUES

Three basic issues are presented to this court by petitioner's Specification of Errors. [3]

1. Did the district court err by dismissing the petition for a writ, whether considered as a writ of error coram nobis or a writ of habeas corpus?

2. Did the district court err by refusing to review the habeas corpus proceeding of June 27, 1966, pursuant to appellant's application for a writ of error coram nobis?

3. Did the district court err by refusing to apply retrospectively the rule of Redrup v. New York, 386 U.S. 767 [18 L. Ed. 2d 515] and the June 12, 1967 decisions following Redrup?

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR BY DISMISSING THE PETITION FOR A WRIT, WHETHER THE WRIT WAS FOR ERROR CORAM NOBIS OR HABEAS CORPUS

Petitioner's argument that the district court committed error is based on two different conceptual applications of the writ of error coram nobis, both of which are mistaken.

First, petitioner urges that coram nobis is a proper means of reviewing the habeas corpus proceeding of June 27, 1966, in the district court. [4]

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3. Page 3 of petitioner's brief.

4. See Petition for Writ of Error Coram Nobis, 67-226-K, filed October 31, 1967 in the District Court, p. 3, Section VIII, pp. 3-4, Section IX, p. 4

(continued on following page)

Second, petitioner argues that either coram nobis or habeas corpus will afford him a vehicle for a new and independent review of the original conviction in the state municipal court by the district court. [5]

An evaluation of petitioner's second contention will lay the foundation for dealing with his first argument.

Coram Nobis

The writ of error coram nobis is not a proper device for the review of a state conviction by the United States District Court. United States v. Morgan (1954) 346 U.S. 502 [98 L. Ed. 248]. The Morgan case teaches us that in regard to federal prisoners, jurisdiction may be conferred by the All Writs Section of the Judicial Code, 28 U.S.C. § 1651(a) [6] upon the federal court that imposed the sentence even though the federal prisoner may have served the sentence. Coram nobis may not, however, be used as a collateral writ of error between state and federal

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4. (continued from preceding page)
Section XI (1) and (4); Petitioner's Points and Authorities in Reply, 67-226-K, filed November 17, 1967 in the District Court, p. 1, lines 3-5, lines 16-21; Appellant's Opening Brief, No. 22555, filed with this Court, p. 3, Specification of Errors numbered as 1, 2 and 3.

5. See Petition for Writ of Error Coram Nobis, 67-226-K, filed October 31, 1967 in the District Court, pp. 4-5, Section XI (a) (3) (5) and (6); Petitioner's Points and Authorities in Reply, 67-226-K, filed November 17, 1967 in the District Court, p. 1, lines 26-29, p. 3, lines 7-19; Appellant's Opening Brief, No. 22555, filed with this Court, Specification of Errors numbered as 1, 4 and 5.

6. 28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

jurisdictions.[7] The United States Court of Appeals, Tenth Circuit, faced the issue in Rivenburgh v. Utah (1962) 299 F.2d 842, 843:

> "[1-3] Coram nobis is a remedy recognized in some state judicial systems and as such may premise an ultimate review of state action by way of certiorari to the Supreme Court of the United States. Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114. And the writ is sometimes broadly recognized as available in matters strictly confined within the federal judicial system. Dotson v. United States, 10 Cir., 287 F.2d 868; United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248. But the use of the writ is limited by tradition and rule, Fed. rules Civ. Proc., Rule 60(b), 28 U.S.C.A., and cannot be used as a substitute for habeas corpus or as a collateral writ of error between state and federal jurisdictions. The essence of petitioner's claim is that he should be granted a new trial because of newly discovered evidence. We are in complete accord with the trial's [sic] court order that the petition sets out no federal basis or claim for relief cognizable in the federal court.
>
> The motion to dismiss the appeal is granted and the appeal is dismissed."

The citation by appellant of the Morgan case does nothing to sustain his

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7. This court has recognized the principle as set forth in Morgan. See Madigan v. Wells, (9th Circ. 1955) 224 F.2d 577, footnote 2, Cert. den. 351 U.S. 911 [100 L.Ed. 1446] and In re Lempia (9th Circ. 1956) 247 F.2d 240, Cert. den. 352 U.S. 931 [1 L.Ed.2d 166]. A discussion of the rule is carried in 49 C.J.S. 313(b) (1947).

jurisdictional argument. In Morgan the petitioner filed his application for a writ of error coram nobis in the federal district court where he was first tried and convicted. Here, appellant seeks to use coram nobis as a means of collateral review of his original conviction in the state court. Clearly, this is not the purpose of coram nobis. The district court has no jurisdiction to entertain such an application and the petition filed on these grounds was properly denied. The denial should be affirmed.

Coram Nobis Considered As Habeas Corpus

The application by appellant herein for a writ of error coram nobis, whether considered as coram nobis or as habeas corpus, fails to confer jurisdiction on the district court for another reason.

In the case of Parker v. Ellis (1960) 362 U.S. 574 [4 L. Ed. 2d 963] the United States Supreme Court ruled that, where petitioner had made application in federal court for a writ of habeas corpus seeking a review of a state conviction and where, prior to the hearing on habeas corpus, petitioner had been released from state prison and was not placed on parole, the case had become moot. The court determined that it was without jurisdiction to deal with the merits of petitioner's claim. It refused to proceed to adjudication where there was no subject matter on which the judgment of the court could operate. [8]

This rule of law has been recognized and followed by the United States Court of Appeals, Ninth Circuit. In Bonnie v. Gladden (9th Circ. 1967) 377 F. 2d 555, while petitioner's appeal of the denial of a petition for writ of habeas

8. At page 575 of the decision.

corpus was pending, his sentence was completed and he was discharged from confinement without parole. Under these circumstances the court ruled:

> "In light of this development we are without power to deal with the merits of Bonnie's claim under the interpretation of the 'in custody' requirement of 28 U.S.C. 2241(c) (1) (1964) adopted in Parker v. Ellis, 362 U.S. 574, 80 S. Ct. 909, 4 L. Ed. 2d 963 (1963).
>
> "The case must therefore be remanded to the district court with instructions to vacate the order appealed from and dismiss the application for habeas corpus."[9]

The principle as described and followed in Bonnie was also held to be controlling in Benson v. State Board of Parole and Probation (9th Circ. 1967) 384 F. 2d 238. In the Benson case petitioner's declaratory relief action was dismissed as moot when his state prison sentence had expired. Petitioner argued that he continued to suffer the consequences of the state conviction for forgery regardless of the expiration of his sentence. He asserted that as a result of his conviction he lost his license as a public accountant and insurance agent, was disqualified as a juror, and was burdened with "liability to future enhanced punishment."[10]

Petitioner's arguments notwithstanding, the court ruled that it was without power to consider the merits of the state prisoner's case where he had completed his sentence. It found petitioner's application of the Morgan principle to be improper. In referring to Morgan and comparing it to Parker v. Ellis, the court determined that "there is no suggestion that the writ of coram nobis would

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9. At page 555.

10. At page 239. The last assertion is taken to mean that in the event of subsequent convictions, petitioner could expect harsher punishment due to his earlier conviction.

be available to a state prisoner whose custody has terminated."[11]

Further, it is settled law in the Ninth District that the All Writs Statute does not confer jurisdiction upon the district court in cases where the issues are rendered moot by reason of the unconditional release of the prisoner and appellant. The court in Benson followed its earlier ruling in Stafford v. Superior Court of California (9th Circ. 1959) 272 F.2d 407, and determined that the All Writs Statute may be invoked by the district court only in the aid of jurisdiction which it already has. The Statute may not be used to confer jurisdiction where none otherwise exists.[12]

The conclusion is inescapable that the court below correctly ruled that it was without jurisdiction to hear appellant's case on its merits. Further, appellant has cited no authority which would authorize this court to rule otherwise. Those cases relied on by appellant are either distinguishable from, or entirely inapplicable to, the case before the court.[13]

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11. At page 239. For a similar conclusion see Cole v. United States (10th Circ. 1963) 311 F.2d 492.

12. At pages 239-240.

13. Those cases cited by appellant that are not discussed in the body of respondent's brief are distinguished here. In re Gault, 387 U.S. 1, contained facts so completely unrelated to those in this case that its citation is irrelevant. To generalize, Gault ruled that due process requirements must be observed in juvenile court proceedings. There was nothing in Gault to suggest that the district court in this case had jurisdiction to entertain a petition for a writ of error coram nobis. Miranda v. Arizona, 384 U.S. 436, has no application to this case whatsoever. Respondent was somewhat perplexed by appellant's citation of Sanchez Tapia v. U.S., 227 F.Supp. 35, affirmed 338 F.2d 961, Cert. den. 380 U.S. 957. The case sustains respondent's position. The appellant in Sanchez was originally convicted and sentenced in the U.S. District Court for the District of Puerto Rico. Appellant then brought

(continued on next page)

The district court properly denied the petition filed by appellant on the above grounds and the denial should be affirmed.

II

THE DISTRICT COURT DID NOT ERR BY REFUSING TO REVIEW THE HABEAS CORPUS PROCEEDING OF JUNE 27, 1966 PURSUANT TO APPELLANT'S APPLICATION FOR A WRIT OF ERROR CORAM NOBIS

As was explained above, the essence of appellant's argument contemplates a review of the state court conviction. In an effort, however, to avoid the inevitable problems created by the impropriety of such an action, appellant also asserts that coram nobis was sought in the district court as a review by that court of its own habeas corpus proceeding of June, 1966. It is noteworthy that no authority is cited by appellant to indicate that the court below had jurisdiction to entertain a coram nobis petition for this purpose. [14]

The fact is that appellant seeks to warp the device of coram nobis to suit his

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13. (continued from preceding page)
a petition for coram nobis in the U.S. District Court for the Southern District of New York. The District Court in New York granted the government's motion to dismiss the application concluding that it had no jurisdiction to act. It ruled that the appellant's remedy was in the trial court in which appellant was tried, convicted and sentenced. Again, the citation by appellant of U.S. v. Marcello, 210 F. Supp. 892, affirmed 328 F.2d 961, Cert. den. 377 U.S. 992, sustains respondent's position. Petitioner in Marcello correctly applied for relief in the trial court in which he originally suffered a conviction. The same facts were evident in Lark v. U.S., 251 F. Supp. 471. Appellant herein cited Sanders v. U.S., 373 U.S. 1, to sustain his argument that "the fact that petitioner is no longer in custody is immaterial since the result of his conviction persists." The defendant in Sanders was in custody at the time he pursued his application for a writ of habeas corpus, thus, the case does not sustain appellant's argument. In Fay v. Noia, 372 U.S. 391, similar facts existed; petitioner was in custody while he sought a writ of habeas corpus.

14. Appellant's cases are distinguished in note 13 above.

own purposes. The writ was never meant to confer jurisdiction under these circumstances. Ths most liberal application of coram nobis makes it clear that the writ enables the trial court to review its own trial proceedings and judgment. [15] Coram nobis is not a proper means of reviewing the denial of a petition for habeas corpus; this is now made clear by statute. [16] A careful reading of Morgan, the case upon which appellant so heavily relies, shows the correctness of the application of Federal Rule 60(b) by the judge in the district court proceedings. The Supreme Court restated the established rule that habeas corpus affords relief in a separate case and record, the beginning of an entirely separate civil proceeding. [17] Any review of a habeas corpus proceeding is a review of a civil proceeding and no amount of rationalization by appellant can change the law. Thus, the district court was correct in its conclusion that it lacked jurisdiction. Rule 60(b) has abolished coram nobis as a writ for the review of civil proceedings.

Let us assume, however, that the court below could have found jurisdiction to consider appellant's petition. The court would still have been compelled to deny the application because appellant sought to remedy an alleged wrong that coram nobis could not reach. Coram nobis lies for an error of fact in existence at the time of trial though not apparent on the record, and which, if known by the trial

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15. U.S. v. Morgan at pages 505, 507, 509.

16. Fed. Rule 60(b) in applicable part reads: "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from judgment shall be by motion as prescribed in these rules or by an independent action."

court would have prevented the rendition of judgment.[18] Appellant, by his own acknowledgment,[19] seeks redress for an alleged error of law. Coram nobis does not afford such redress.

Again, the district court properly denied appellant's petition filed on the above grounds and the denial should be affirmed.

III

THE DISTRICT COURT DID NOT ERR BY REFUSING TO APPLY RETROSPECTIVELY THE REDRUP CASE AND THE JUNE 12, 1967 DECISIONS FOLLOWING THAT CASE

Appellant contends that on October 31, 1967, the court below should have applied the principles set forth in the May 8, 1967 case of Redrup v. New York, 386 U.S. 767 [18 L. Ed. 2d 515], the principle of which was followed in thirteen of the sixteen obscenity cases decided by the Supreme Court on June 12, 1967. By November 8, 1966, the petitioner had completed the term of his probation and his sentence was served. Stated differently, appellant completed the serving of his sentence nearly twelve months prior to the filing of the application for a writ of error coram nobis in the court below. To comply with appellant's contention the district court would have had to apply retrospectively the new obscenity cases to either the state conviction of August 10, 1965 or to the habeas corpus proceeding of June 27, 1966.

Appellant relies upon the thirteen June 12, 1967 Supreme Court decisions

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18. U.S. v. Morgan at pages 507, 509. For a general discussion of the rule see 49 C.J.S. § 313(c) (d).

19. See the last line of page 2 of Appellant's Opening Brief.

in which convictions were reversed, but he ignores two of the three remaining obscenity cases decided by the Supreme Court on the same day, Jacobs v. New York, 388 U.S. 431 [18 L.Ed.2d 1294] and Tannenbaum v. New York, 388 U.S. 439 [18 L.Ed.2d 1300]. In both cases motions to dismiss were granted and the appeals were dismissed as moot. In each case suspended sentences had been levied against the appellants. The applicable state law recited that the maximum time during which the appellants could have had their sentences revoked and replaced by prison terms was one year from the date of sentencing. More than one year had elapsed while the respective appeals were pending, thus, the appellants had, in effect, served their sentences and their cases were ruled moot. [20]

It is clear the Supreme Court does not intend that newly defined concepts of obscenity be applied retrospectively when a case has been rendered moot by reason of the completion of the sentence. This was held to be the law even where the appellate process in the two cases cited above was begun prior to the expiration of the period within which the appellants stood in jeopardy, whether by reason of confinement, fine, suspended sentence or parole. Certainly the same principle is applicable to the process of collateral attack upon a conviction, especially when the institution of that attack was subsequent to the case having

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20. Jacobs v. New York at page 432. It is interesting to note the positions taken by the respective justices. In the Jacobs case, the motion to dismiss the case as moot was granted by a five-justice majority. Justice Brennan would have affirmed the conviction, Justice Fortas would have reversed the conviction, Chief Justice Warren wanted to face the issue of obscenity and disagreed with the application of the mootness doctrine, and Justice Douglas wanted to see the mootness issue briefed and argued. In the Tannenbaum case Justice Fortas joined the majority on granting the motion to dismiss for mootness, Justice Brennan would have reversed the conviction and the Chief Justice and Justice Douglas stood by their dissenting opinions in Jacobs.

become moot.

This resolution by the Supreme Court of the problem of retrospective application of new obscenity decisions to mooted cases precludes the need for a discussion of the general principles of retrospective application[21] which, in themselves, would preclude the court below from applying the Redrup and June 12, 1967 decisions to appellant's case.

The district court properly declined to apply retrospectively the Redrup and June 12, 1967 decisions of the Supreme Court and the denial of appellant's petition sought on the above ground should be affirmed.

CONCLUSION

From the above review of the facts and the law the merit of respondent's position is clear: that the district court did not err by dismissing appellant's petition for a writ, whether considered as coram nobis or habeas corpus, that the court below did not err by refusing to review the habeas corpus proceeding pursuant to appellant's petition for writ of error coram nobis, that the district court did not err by refusing to apply retrospectively the Redrup and June 12, 1967 Supreme Court decisions.

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21. Johnson v. New Jersey (1966) 384 U.S. 719 [16 L. Ed. 2d 882], Tehan v. Shott (1965) 382 U.S. 406 [15 L. Ed. 2d 453], Linkletter v. Walker (1965) 381 U.S. 618 [14 L. Ed. 2d 601] and for a general discussion of the principle see Retroactive or Merely Prospective Application, 14 L. Ed. 2d 992.

Respondent therefore respectfully submits that the decision of the court below should be approved and its judgment affirmed.

Respectfully submitted,

EDWARD T. BUTLER, City Attorney,

By: /s/ KENNETH H. LOUNSBERY,
Deputy

Attorneys for Respondent.

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those Rules.

/s/ KENNETH H. LOUNSBERY, Deputy.